

² The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

the period January 7 through March 3, 2018; and (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

On December 28, 2004 appellant, then a 35-year-old motor vehicle operator, filed a traumatic injury claim (Form CA-1) alleging that on December 27, 2004 he injured his neck, head, and left leg while in the performance of his federal employment duties. He did not stop work. By decision dated January 27, 2005, OWCP accepted appellant's claim for cervical and left thigh strain and mild concussion.

Appellant stopped work on February 21, 2005 and underwent authorized left-sided lumbar partial hemilaminotomy and microdiscectomy at L3-4 on March 30, 2005. Beginning February 21, 2005, OWCP paid him compensation for temporary total disability on the periodic rolls. Appellant initially returned to full-time, light-duty work on May 3, 2005 and subsequently returned to full-time, full-duty work on May 31, 2005.

By decision dated June 3, 2011, OWCP accepted that appellant sustained a recurrence of disability commencing May 23, 2011, causally related to his accepted December 27, 2004 employment injuries. It paid him compensation for temporary total disability on the supplemental rolls, commencing June 6, 2011.³

On September 13, 2011 appellant underwent authorized repeat left-sided lumbar hemilaminotomy at L3-4 and discectomy freely ruptured fragment downstream at left L3-4. He also underwent bilateral decompressive hemilaminotomy at L4-5 with medial facetectomies and foraminotomies for L5 nerve roots. Appellant returned to part-time, light-duty work on September 26, 2011 and continued to receive disability compensation on the supplemental rolls. He later returned to full-time, light-duty work on November 1, 2011.

By decision dated June 25, 2013, OWCP expanded the acceptance of appellant's claim to include displacement of the lumbar intervertebral disc without myelopathy and atony of the bladder. It authorized L3-4 and L4-5 decompression with pedicle screw fixation and fusion performed on July 24, 2013. OWCP paid appellant temporary disability compensation on the supplemental rolls commencing June 19, 2013.

Appellant returned to full-time modified work on September 30, 2013. He stopped work again on October 15, 2015 and OWCP paid compensation for temporary total disability for the period October 15 through December 12, 2015 on the periodic rolls. Appellant returned to part-time, light-duty work on January 26, 2016 and received disability compensation benefits on the supplemental rolls. He stopped work on February 4, 2016 due to the employing establishment's withdrawal of light-duty work and has not returned to work. OWCP paid appellant compensation for temporary total disability on the periodic rolls commencing March 6, 2016.

³ The record indicates that appellant used sick leave from May 23 through June 5, 2011.

Appellant retired from the employing establishment, effective October 4, 2016.

By letter dated June 6, 2017, OWCP referred appellant, together with a statement of accepted facts, the medical record, and a set of questions, to Dr. Sami R. Framjee, a Board-certified orthopedic surgeon, for a second opinion to determine whether appellant continued to have residuals from his accepted December 27, 2004 employment injuries and to determine his current work capacity. In a medical report dated July 18, 2017, Dr. Framjee diagnosed status post L3-4 discectomy two times and status post posterior spinal fusion and transpedicular fixation at L3-4 and L4-5. He found no clinical evidence of any injury to the cervical spine secondary to appellant's 2004 work-related injury. In a work capacity evaluation (Form OWCP-5c) also dated July 18, 2017, Dr. Framjee indicated that appellant could not perform his usual job, but he could work eight hours a day with certain physical work restrictions.

On November 30, 2017 the employing establishment offered appellant a full-time motor vehicle dispatcher position based on Dr. Framjee's physical work restrictions. On December 5, 2017 appellant informed OWCP that he disagreed with Dr. Framjee's findings and indicated that he wished to elect compensation benefits from the Office of Personnel Management (OPM).

On December 6, 2017 appellant completed a Form CA-1105, electing OPM retirement benefits, effective January 7, 2018.

In a letter dated March 12, 2018, OWCP advised OPM that appellant had elected OPM benefits in lieu of compensation benefits under FECA. It requested that OPM commence monthly annual benefits, effective January 7, 2018 and that it reimburse OWCP \$4,893.50 for FECA benefits it had paid him during the period January 7 to March 3, 2018.

By letter dated June 7, 2018, OWCP informed appellant of its preliminary determination that an overpayment of compensation in the amount of \$4,893.50 had been created for the period January 7 through March 3, 2018. It explained that the overpayment occurred because he received both FECA benefits and OPM retirement benefits during this period. OWCP found appellant at fault in the creation of the overpayment because he had accepted a payment he knew or should have reasonably known was incorrect. It advised him that he could submit evidence challenging the fact, amount, or fault finding and request waiver of recovery of the overpayment. Additionally, OWCP informed appellant that, within 30 days, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. It requested that he complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documents.

In an overpayment action request signed June 18, 2018, appellant requested a telephone conference on the issue of fault in the creation of the overpayment with OWCP's Branch of Hearings and Review. He contended that he did not start his monthly OPM annuity payments until April 2018. Appellant noted that he was still waiting for his social security check to be straightened out. He submitted a completed Form OWCP-20 also dated June 18, 2018. Appellant reported monthly income of \$559.00, monthly expenses of \$3,400.00, and other funds of \$2,350.00. He submitted supporting financial documents. Appellant asserted that he was not at fault in the creation of the overpayment because he was told by the employing establishment that it had a job for him and he was waiting to see if he was going to be on workers' compensation or

disability, or return to work. He claimed that he tried to contact OWCP on numerous occasions, but his calls were not returned. Appellant also claimed that he never received a payment from OPM.

OWCP, by letter dated July 26, 2018, informed appellant that it had unsuccessfully attempted to return his July 24, 2018 telephone call. It was also unable to return his July 31, 2018 telephone call.

By decision dated August 27, 2018, OWCP finalized its preliminary overpayment determination that appellant received an overpayment of compensation in the amount of \$4,893.50 because he concurrently received FECA disability benefits and OPM retirement benefits for the period January 7 through March 3, 2018, and that he was at fault in the creation of the overpayment.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ Section 8116(a) provides that, while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the Armed Forces, including benefits administered by the Department of Veterans Affairs, unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁵

Section 10.421(a) of OWCP's implementing regulations provides that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁶ The beneficiary must elect the benefit that he or she wishes to receive.⁷ OWCP procedures also explain that the employee must make an election between FECA benefits and OPM benefits. The employee has the right to elect the monetary benefit which is the more advantageous.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not established that appellant received an overpayment of compensation in the amount of \$4,893.50.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116(a).

⁶ 20 C.F.R. § 10.421(a).

⁷ *Id.*

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (January 1997); *see also* *R.S.*, Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

OWCP based its overpayment determination on its finding that appellant had received prohibited dual OPM and FECA benefits for the period January 7 through March 3, 2018. While the record reflects that appellant received FECA benefits for this period, it has not established that he also received OPM benefits during this entire period.⁹

Appellant elected OPM retirement benefits, effective January 7, 2018. On March 12, 2018 OWCP requested that OPM commence retirement benefit payments and that OPM reimburse any FECA benefits paid to him after January 7, 2018. However, there is no evidence of record which establishes, as a matter of fact, that appellant actually received OPM benefits, the periods during which he received such benefits, or the amount of benefits he received following his election.¹⁰ He contended that he did not start his monthly annuity payments until April 2018 and that he never received any compensation from OPM. The record is also silent as to whether OPM reimbursed OWCP for FECA benefits paid to appellant during the period in question.

The Board thus finds that OWCP improperly determined that appellant received an overpayment of compensation during the period January 7 through March 3, 2018.¹¹

CONCLUSION

The Board finds that OWCP has not established that appellant received an overpayment of compensation in the amount of \$4,893.50.¹²

⁹ *E.R.*, Docket No. 18-0084 (issued July 27, 2018); *R.R.*, Docket No. 18-0032 (issued May 3, 2018).

¹⁰ *Id.* The election form signed by appellant on December 6, 2017 is insufficient to show that he actually began receiving OPM benefits at any time.

¹¹ *Id.*

¹² In light of the Board's finding in Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 25, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board